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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

in the Matter of  
Amendment of Section 73.202(b)  
FM Table of Allotments  
To Reserve Channel 252C2  
Columbia, Missouri  
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MM Docket No. RM-

To Reserve Channel 252C2  
Columbia, Missouri )  
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Columbia, Missouri )

Media Bureau

The Curators of the University of Missouri (the "University"), by its counsel and

reconsideration of the Letter from John A. Karousos, Assistant Chief, Audio Division, Media

Petition for Rule Making to reserve Channel 252C2 at Columbia, Missouri for noncommercial

and the resultant denial of a second NCE service to over twenty-two thousand people mandates

reconsideration and reservation of Channel 252C2, Columbia, Missouri for NCE use.

*In a Public Notice, Media Bureau Opens Window to Permit Noncommercial Educational*

*Reservation Showings for Certain Vacant FM Allotments*, 18 FCC Rcd 19600, (MB 2003) (the

“Public Notice”), the Commission announced that the Media Bureau was opening a window to

permit noncommercial educational reservation showings for certain FM allotments.

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Attachment A to the Public Notice, which identified the pertinent vacant FM allotments included Channel 252C2 at Columbia, Missouri. The Notice stated that a party must file a Petition for Rule Making to amend the FM Table of Allotments on or before November 21, 2003.

On October 30, 2003, the University filed a Petition to Rescind the Public Notice. The Petition to Rescind argued that the Public Notice was based on certain actions taken by the Commission in its *Second Report and Order in the Matter of Reexamination of the Comparative Standard for Noncommercial Educational Applicants*, FCC 03-44, released April 10, 2003 (the “*Second Report and Order*”), and that the Commission had not yet considered petitions for reconsideration of the *Second Report and Order*. The University’s Petition for Reconsideration argued that the reservation standards were impossible to meet in many communities, thus making the possible reservation of channels largely fictitious. The Petition to Rescind further argued that the Commission’s instructions concerning the reservation showing were contradictory and arbitrary.

As of the November 21, 2003 filing deadline, the Commission had not acted on either the Petitions for Reconsideration of the *Second Report and Order* or the Petition to Rescind. The University thus filed a Petition for Rule Making to reserve Channel 252C2 at Columbia, Missouri for noncommercial educational use. Specifically, the University requested that the Commission initiate a rule making proceeding to amend Section 73.202(b) of its rules, the FM Table of Allotments, to reserve Channel 252C2 at Columbia, Missouri for NCE use at coordinates 38-57-21 N-Lat. and 92-16-24 W-Long. Thus, the University requested the following change in the FM Table of Allotments:

	<b>Current</b>	<b>Proposed</b>
Columbia, MO	244C1, 252C2, 268C1, 272A	244C1, *252C2, 268C1, 272A

To the University's knowledge, it was the only Petitioner to reserve Channel 252C2. On March 18, 2004, the University's Petition for Rule Making was returned by the Letter. To date, the Commission has not acted on either the Petitions for Reconsideration of the Second Report and Order or the Petition to Rescind. Accordingly, the University is filing this Petition for Reconsideration which seeks to reverse the Letter's return of the Petition for Rule Making and to reserve Channel 252C2 at Columbia, Missouri for noncommercial educational use.

## **II. Channel 252C2 at Columbia, Missouri Should Be Reserved for NCE Use**

The University's Petition complied with the reservation criteria set forth by the Commission in the *Second Report and Order* with one exception.<sup>1</sup> While the proposal would provide a second service to a sizeable population of 22,095, statistically that population comprises 7.32% rather than 10% of the service area. In its Petition, the University requested that the percentage element of the reservation criteria be waived. The Letter, in returning the University's Petition solely based on the fact that "reserving the allotment would not provide a first or second NCE radio service to at least 10 percent of the population within the proposed service area," does not even acknowledge the University's request for a waiver of that requirement. *Letter* ¶ 3. The Letter's failure to address the University's waiver request mandates that the Commission reconsider the University's Petition for Rule Making and reserve Channel 252C2 for NCE use.

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<sup>1</sup> See *Second Report and Order*, ¶¶ 34-40. Note that if Channel 252C2 is reserved at Columbia, Missouri, the University intends to apply for the channel, and, if authorized, intends to construct and operate a new NCE FM station. The University has already been approved as a NCE licensee and currently operates six NCE FM stations in the State of Missouri.

It is axiomatic that the Commission must give all waiver requests a “hard look” and that mere “perfunctory treatment” of waiver requests violates the Commission’s duty to regulate in the public interest. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); 47 C.F.R. § 73.3566. Here, the Commission clearly did not give the University’s waiver request a “hard look” analysis as evidenced by the Letter’s failure to even address the waiver request. Worse than a “perfunctory” denial, the Letter did not even mention the University’s waiver request. In the words of the D.C. Circuit, the Letter is “intolerably mute.” *WAIT Radio*, 413 F.2d at 1157. *WAIT Radio* and Section 73.3566 of the Commission’s Rules absolutely require the Commission to address the University’s waiver request, and the Letter’s failure to do so mandates that the Commission grant the instant Petition for Reconsideration.

### **III. Channel 252C2 Should Be Reserved for Noncommercial Educational Use Because Good Cause Exists for Grant of the Waiver Request**

The Commission may waive its rules for “good cause.”<sup>2</sup> In the instant case, the proposed noncommercial allocation and station will provide valued NCE service to a population of 301,506 and provide a second NCE service to over 22,000 people, nearly 10 percent of that population. None of the non-reserved channels in Columbia are allocated to NCE stations,<sup>3</sup> and as demonstrated in the engineering analysis the University submitted with its Petition for Rule Making, “there are no channels available to establish an NCE station that would provide any amount of service within the proposed allocation’s 1mV/m coverage area.” Given the Commission’s apparent and laudable concern with providing a second NCE service to the public,

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<sup>2</sup> See 47 C.F.R. § 1.3.

<sup>3</sup> See 47 C.F.R. § 73.202(b).

it is irrational to return a Petition for Rule Making that would provide such a second service to over twenty-two thousand people.

Moreover, as the University has explained in other proceedings, the Commission's spectrum reservation test is extraordinarily difficult to satisfy, especially for a Class C2 station, and essentially bars new NCE stations from non-reserved spectrum.<sup>4</sup> The Commission has not explained how it arrived at a ten percent threshold or why only first or second NCE services are relevant in satisfying that threshold. Faced with the brief filing window and the ten percent requirement contained in the Public Notice, the University suddenly and unexpectedly found itself having to satisfy an arbitrary requirement or to forsake any hope of bringing NCE service to the community of Columbia after many years of seeking Commission approval to operate the former Michael Rice station on Channel 252C2 on an interim or permanent basis.. For these reasons, there is good cause for grant of the requested waiver and such grant will clearly promote the public interest.

#### **IV. The Unique Circumstances Surrounding Channel 252C2, Columbia, Missouri Also Counsel for Reservation of the Station for Noncommercial Educational Use**

The Columbia community has been deprived of any service on Channel 252C2 since October 3, 2001 as the process of replacing the former owner, Michael Rice and his organization, has been ongoing now for over two and a half years.<sup>5</sup> Simply by granting the University's waiver request and Petition for Rule Making, the Commission can achieve the following public interest benefits: (1) the two and half year loss of service will be ameliorated almost

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<sup>4</sup> See The Curators of the University of Missouri, Petition for Reconsideration, MM Docket No. 95-31 (June 16, 2003).

<sup>5</sup> See *Michael S. Rice*, 16 FCC Rcd 18394 (2001).

immediately; (2) a new NCE service will be provided to over 300,000 people; and (3) over 22,000 people will gain a second NCE service.

In contrast, should the Commission proceed to auction, litigation appears likely to keep the former Rice station's frequency silent for many years. One of the entities either associated with or including Michael Rice<sup>6</sup> could make the highest bid, leading to years of litigation as these relationships allow others to challenge the high bidder's character qualifications. Petitions to deny would likely ensue, and the Commission, having rebuffed Mr. Rice's previous attempts to maintain his licenses, would conceivably grant the petition to deny, which would then lead to a court appeal. While the court appeal is pending, the Commission would then be obliged to hold another auction, excluding any party found "unfit" following the first auction. But the winning party from the first auction is likely to challenge the grant arising from the second auction. This scenario, and all the permutations that an auction proceeding here might create, represent a blueprint for long-term litigation and continued loss of service.

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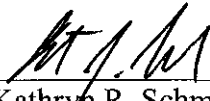
<sup>6</sup> Pleadings filed with the Commission allege that two of the applicants for interim authority to operate the former KMFZ have maintained close ties to or include Michael Rice.

**V. Conclusion**

For the foregoing reasons, reservation of Channel 252C2 at Columbia, Missouri will serve the public interest. Accordingly, the University respectfully requests that the Commission reconsider its letter, grant the requested waiver, and reserve Channel 252C2 at Columbia, Missouri for NCE use.

Respectfully submitted,

THE CURATORS OF  
THE UNIVERSITY OF MISSOURI

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Dated April 19, 2004

### Certificate of Service

I hereby certify that, on this 19th day of April 2004, a true and correct copy of the foregoing Petition for Reconsideration was sent via first-class U.S. mail to the following:

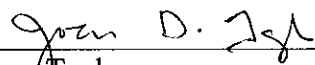
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